Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 10 of the Stock Raising Homestead Act, ch. 9, 39 Stat. 862, 865, delegated to the President authority to withdraw lands from the public domain "containing water holes or other bodies of water needed or used by the public for water purposes" under the Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847. Under the claimed authority of section 10 of the Stock Raising Homestead Act and section 1 of the Pickett Act, President Coolidge issued an Executive Order entitled "Public Water Reserve No. 107," which withdrew from the public domain certain unreserved public lands containing a spring or water hole. The question presented by this petition is as follows:

By enactment of section 10 of the Stock Raising Homestead Act, did Congress intend to give authority to the President to reserve for use by the United States the water as well as the public land containing water holes or other bodies of water needed or used by the public for water purposes?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, J. R. Simplot Co.; Lemhi Irrigation Co.; Dave Nelson; Lola Coates; San Felipe Ranch; Harry R. Bass; Ted S. Blackstock; Richard Brandau; William J. Brockman; Michael F. Hanley, IV; Jerry L. Hoagland; Thomas Ballman Hook; Tim Lowry; Bill Lowry; Paul Nettleton; R. J. Smith; Wiley F. Smith; Mitchell D. Sorensen; Robert Thomas; and Young Harvey Walker participated as respondents in the Idaho Supreme Court.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutory provisions involved	1
Statement of the case	2
Reasons for granting the petition	6
Conclusion	25
Appendix A	App. 1
Appendix B	App. 13
Appendix C	App. 28

TABLE OF AUTHORITIES

Page

CASES:

California v. United States, 438 U.S. 645 (1978) 15, 16

Cappaert v. United States, 426 U.S. 128 (1976) 24

In the Matter of the Adjudication of the Existing Rights to the Use of all the Water, Both Surface and Underground, with all Water Basins in the State of Montana, Case No. WC-88-1 23

In the Matter of the Determination of the Relative Rights to the Use of the Waters of Klamath River and Its Tributaries Pending Before Oregon Water Resources Department 23

In Re: The General Adjudication of all Rights to Use Water in the Gila River System and Source, Maricopa County Superior Court No. W-1, W-2, W-3 W-4 (Consolidated) 23

In Re: The General Adjudication of all Rights to Use Water in the Little Colorado River System and Source, Apache County Superior Court No. 6417 23

Nebraska v. Wyoming, 325 U.S. 589 (1945) 13, 15, 20

United States v. City and County of Denver, 656 P.2d 1 (Colo. 1983) 23

United States v. New Mexico, 438 U.S. 696 (1978) ....*passim*

Washington v. Acquavella, Yakima County Superior Court No. 77-2-01484-5 23

Winters v. United States, 207 U.S. 564 (1908)... 4, 19, 20, 24

Zuber v. Allen, 396 U.S. 168 (1969) 14, 15

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND LEGISLATIVE MATERIALS:

H.R. Rep. No. 35, 64th Cong. 1st Sess. (1916) 4, 9, 10, 12, 18

H.R. 407, 64th Cong. 1st Sess. (1915) ... 9, 10, 11, 12, 14

Kinkaid Act of April 28, 1904, ch. 1801, 33 Stat. 547 10

McCarran Amendment, 43 U.S.C. § 666 (1994) 3, 22

Mining Act of 1866, ch. 262, 14 Stat. 251 15

Organic Administration Act of 1897, ch. 2, 30 Stat. 34 17

Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847 .. 1, 8, 9

Reclamation Act of 1902, ch. 1093, 32 Stat. 388 16

S. Doc. No. 641, 64th Cong. 2d Sess. (1916) 10

Stock Raising Homestead Act, ch. 9, 39 Stat. 862 ... *passim*

Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269 ..... 6, 8, 16

53 Cong. Rec. 23 (1915) 10

53 Cong. Rec. 1171-1173 (1916) 10

53 Cong. Rec. 1234 (1916) 10

53 Cong. Rec. 14131 (1916) 11

54 Cong. Rec. 4 (1916) 11

54 Cong. Rec. 642 (1916) 12, 14

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE REGULATIONS AND OPINIONS:

Circular No. 1028, Use of Lands Withdrawn as Public Water Reserves, 51 I.D. 186, 187 (1925).....12, 15

Compliance by the Department with State Laws Concerning Water Rights, M-33969 (1950) 13

Jack A. Medd, 60 I.D. 83 (1947)..... 13

State of Utah, 45 I.D. 551 (1916).....6, 11, 12, 20, 24

43 C.F.R. 292.10 through 292.17 (1938)..... 13

43 C.F.R. 2311.3 (1976)..... 13

PETITION FOR WRIT OF CERTIORARI

The Attorney General, on behalf of the State of Idaho, petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is reported at ___ Idaho ___, 959 P.2d 449 (Idaho 1998), and is reprinted in Appendix A hereto, (App. 1, *infra*). The order denying a petition for rehearing is unreported. It is reprinted in Appendix C hereto, (App. 28, *infra*). The memorandum decision of the District Court of the Fifth Judicial District for Twin Falls County, Idaho is unreported. It is reprinted in Appendix B hereto, (App. 13, *infra*).

JURISDICTION

The judgment of the Idaho Supreme Court was entered on July 29, 1998, following denial of a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

The Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847, also known as the General Withdrawal Act, provides in relevant part:

> § 1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

43 U.S.C. § 141 (repealed 1976).

The Stock Raising Homestead Act of December 29, 1916 (the "SRHA"), ch. 9, 39 Stat. 862, provides in relevant part:

> § 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe. . . .

43 U.S.C. § 300 (repealed 1976).

STATEMENT OF THE CASE

i. Introduction

The United States filed over 11,000 federal reserved water right claims in the Snake River Basin Adjudication

based on Public Water Reserve 107 (PWR 107), an Executive Order entered on April 17, 1926. The claimed purpose of use was stockwater. The dispute concerns whether Public Water Reserve 107 is a valid basis for a federal reserved water right in the Snake River Basin Adjudication.[1]

The State of Idaho commenced the Snake River Basin Adjudication in 1987, a general adjudication of all water rights acquired under state law and reserved under federal law. The United States was joined as a party in accordance with the McCarran Amendment, 43 U.S.C. § 666 (1994). Pursuant to special statutory procedures enacted to process the more than 170,000 claimed water rights, all water users, including the United States, were required to file a separate notice of claim for each claimed water right. In addition, the Idaho Supreme Court delegated authority to the Idaho District Court to establish further procedures for the processing of the notices of claim.

The Idaho District Court created a procedure to designate and resolve Basin-Wide Issues – issues that materially affect a large number of claimants. The Idaho District Court allows any claimant to file a motion to designate an issue as a Basin-Wide Issue. After opportunity for response by other claimants and hearing, the Idaho District Court determines whether to designate a

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[1] The lower courts did not address, and this appeal does not raise whether the United States followed proper procedures in reserving the lands containing 11,000 PWR 107 claims for stockwater rights.

Basin-Wide Issue and, if so, establishes a briefing and hearing schedule for a decision on the merits.

ii. Proceedings Before the Idaho District Court.

Two water users filed a motion to designate the validity of Public Water Reserve No. 107 as a Basin-Wide Issue. The United States asked for designation of the validity of PWR 107 as a Basin-Wide Issue at the hearing on the motion. R Vol. I, p. 76. The Idaho District Court then designated the following legal issue as Basin-Wide Issue No. 9:

> Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.

R. Vol. I, p. 77.

The United States argued that PWR 107 is an express reservation of water or, in the alternative, that PWR 107 is an express reservation of land with an implied reservation of water under the doctrine first announced in *Winters v. United States*, 207 U.S. 564 (1908). The State of Idaho and other objectors responded with two points, among others. First, PWR 107 did not constitute an express reservation of water. Second, the purpose of PWR 107, as established by the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (hereinafter "SRHA"), was to prevent homesteaders from controlling "a large territory by locating as a homestead the only available water supply for stock in that vicinity." H.R. Rep. No. 35, 64th Cong. 1st Sess. 18 (1916). Congress intended to accomplish this purpose by preventing the private acquisition or enclosure of land containing the spring and not through the

reservation of water "needed or used by the public for water purposes." 39 Stat. 865.

The Idaho District Court concluded that PWR 107 was not a valid basis for a federal reserved water right and stated its conclusions as follows:

> PWR 107 was issued to prevent control of water sources by individual homesteaders and subsequent control of adjacent land. Its express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation. . . . Concomitantly, the homesteaders would appropriate the water so protected and place it to private use.

Appendix at App. 17. The Idaho District Court cited an opinion of the Assistant Secretary of the Interior that concluded that the private appropriation of water from public water reserves was not precluded by the reservation. Appendix at App. 10, n. 4. Thus, the Idaho District Court concluded that no express or implied reserved water right existed for PWR 107. Rather, Congress' purpose in enacting the SRHA was to promote the settlement of the West by making the water found within public water reserves available for private appropriation. Appendix at App. 17.

iii. Proceedings Before the Idaho Supreme Court.

The United States appealed, and the Idaho Supreme Court reversed the Idaho District Court with only a cursory discussion of the issues. First, it characterized PWR 107 as "an express intention by Congress that reserves a

water right in the United States." Appendix at App. 9. It later concluded:

> The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.

Appendix at App. 10. The Idaho Supreme Court failed to even discuss the fact that the Assistant Secretary of the Interior had concluded in *State of Utah*, 45 I.D. 551 (1916), that a member of the public could appropriate water under state law from a public water reserve, a conclusion inconsistent with its decision. Moreover, the court failed to recognize that the Taylor Grazing Act was not enacted into law until eight years after issuance of PWR 107.

REASONS FOR GRANTING THE PETITION

Federal lands "form brightly colored swaths across the map" of Idaho as well as the other Western states. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). The federal government, for example, owns over 65 percent of the land in Idaho. In the arid West, "federal reservations inescapably vie with other public and private claims for the limited quantities [of water] to be found in the rivers and streams." *Id.* The sheer magnitude of the federal landholdings in the West exacerbates the competition for water. *Id.* Thus, as this Court has repeatedly announced,

Congress has expressly deferred to state water law for the allocation of these scarce water supplies. 438 U.S. at 702.

In a decision in direct conflict with this Court's doctrine, the Idaho Supreme Court held that Congress intended through enactment of the Stock Raising Homestead Act to reserve water for stockwatering on federal lands and for the United States to allocate this water for use by stockmen. The decision creates a vast web of potentially 11,000 new federal reserved water rights on the 11.9 million acres of public domain land in Idaho that will displace thousands of water rights established by private individuals under Idaho law. These water users will now be required to seek permission from the federal government to use the water on public water reserves. Never before has this Court sanctioned a federal system of allocation of water. Yet, that is the effect of the Idaho Supreme Court's misapplication of this Court's doctrine.

I. The Idaho Supreme Court's PWR 107 Decision is in Direct Conflict with the Law Governing Federal Reserved Water Rights as Established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978).

A. Introduction

The United States argued in this case that PWR 107 constitutes an express reserved water right, and the Idaho Supreme Court agreed. The Idaho Supreme Court stated:

> [W]e conclude that **PWR 107 evidences an express intention by Congress that reserves a water right in the United States.**
>
> . . . .

> In the present case, the United States has limited its claim for a reserved water right to stock water consumption. The United States asserts that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act. The United States persuasively argues that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes.

Appendix at App. 9 (emphasis added). There is much wrong with these superficial conclusions.[2] First, these conclusions are inconsistent with the legislative and administrative history upon which PWR 107 is based. Second, these conclusions directly conflict with *United States v. New Mexico* in several respects.

B. The Purpose of PWR 107 was to Make Water on the Reserved Land Available for Private Appropriation.

PWR 107 was issued under the Pickett Act of June 25, 1910, ch. 421, 36 Stat. 847, and section 10 of the Stock Raising Homestead Act of December 29, 1916, ch. 9, 39

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[2] For example, the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, was only an optimistic gleam in a federal bureaucrat's eye in 1926. President Coolidge signed PWR 107 over eight years prior to the enactment of the Taylor Grazing Act in 1934, and the SRHA preceded the Taylor Grazing Act by over seventeen years.

Stat. 862, 865. Thus, a brief review of both acts is necessary to understand the purposes for the creation of PWR 107. This review refutes the Idaho Supreme Court's finding that Congress intended by enactment of the SRHA to reserve water for stockwatering purposes. Rather, section 10 of the SRHA was for the express purpose of ensuring public access to and use of water on these public water reserve lands pursuant to state law.

1. The Creation of Public Water Reserves Began with the Pickett Act.

The Pickett Act authorized the President to "temporarily withdraw from settlement, . . . any of the public lands . . . and reserve the same for . . . other public purposes. . . . " 36 Stat. 847. The President began entering executive orders for public water reserves in 1912. Exhibit 3. As the name implies, the lands were reserved so that the water would be available for public use.

The first such public water reserve in Idaho was Public Water Reserve 28 entered on May 31, 1915; Exhibit 4. The President had withdrawn 182,653 acres as public water reserves under the general authority of the Pickett Act by June 30, 1915. H.R. Rep. No. 35, 64th Cong. 1st Sess. 10 (1916); Exhibit 15.

2. Congress Endorsed the Creation of Public Water Reserves by the Enactment of the Stock Raising Homestead Act.

Congressman Ferris introduced H.R. 407, 64th Cong. 1st Sess. 1915), to provide for stock raising homesteads.

53 Cong. Rec. 23 (1915). This bill was to become the SRHA. The bill was the "result of the joint efforts of the committee [Public Lands Committee of the House of Representatives] and the Interior Department." H.R. Rep. No. 35, 64th Cong. 1st Sess. 13 (1916); Exhibit 15. Section 10 of H.R. 407 expressly authorized the President to reserve land "**containing water holes or other bodies of water needed or used by the public for watering purposes.**"[3] 39 Stat. 865 (emphasis added).

The congressional debate regarding H.R. 407 emphasized that the purpose of the legislation was to settle the West. *Id*. The major change proposed by H.R. 407 was to increase the size of a homestead to 640 acres in order to provide sufficient size for a family to make a living on the poorer quality lands remaining after fifty years of homesteading. In this respect, H.R. 407 was modeled after earlier legislation that had authorized larger homesteads in the state of Nebraska.[4] 53 Cong. Rec. 1171-1173 (1916) (statement of Congressman Kinkaid). Simply put, the purpose of H.R. 407 was to carry out "the time-honored policy of this Government to use the public domain as far as possible to furnish homes for the citizens of our country." H.R. Rep. No. 35, 64th Cong. 1st Sess. 14-15 (1916).

The House of Representatives passed H.R. 407 on January 18, 1916. 53 Cong. Rec. 1234 (1916). The Senate

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[3] The provision regarding water holes was originally in section 11. H.R. Rep. No. 35, 64th Cong. 18 (1916). The water holes provision became section 10 when section 9 was deleted in conference. S. Doc. No. 641, 64th Cong. 2d Sess. 1 (1916).

[4] This earlier act is known as the Kinkaid Act of April 28, 1904, ch. 1801, 33 Stat. 547.

passed H.R. 407 on September 8, 1916. 53 Cong. Rec. 14131 (1916). However, the first session of the 64th Congress ended before a conference committee could be appointed to resolve differences between the House and Senate versions of the bill.

After adjournment of the first session, the Department of the Interior issued its decision in *State of Utah*, 45 I.D. 551 (1916), which related to a public water reserve created solely under the authority of the Pickett Act. In that decision, the Assistant Secretary of the Interior concluded:

> There is in the withdrawal of these lands [for a public water reserve] nothing which prevents any person filing such an appropriation [of water] under the laws of Utah at any time. If, however, the appropriator shall seek to fence the land, or to erect structures thereon which would prevent the public from continued free access to all parts of it, he would be exceeding the rights which could be granted him under State law. . . .

45 I.D. at 554. Because of the timing of the issuance of this opinion, it was not mentioned in the Committee Reports. However, the conclusion of the opinion is consistent with the plain language of section 10. Moreover, since the Department of the Interior was a proponent of the SRHA, it would have advised Congress if it thought H.R. 407 would lead to a result different from *State of Utah*.

The second session of the 64th Congress convened on December 4, 1916, and a conference committee began deliberations. 54 Cong. Rec. 4 (1916). Even though the

conference committee recommended amendments to section 10 after consultation with the Department of the Interior, no amendments were offered concerning the congressional authorization of public water reserves. 54 Cong. Rec. 642 (1916) (statement of Senator Thomas). Thus, throughout the congressional debate of H.R. 407, the express purpose of section 10 was to "authorize the Secretary of the Interior to withdraw from entry and hold open for the general use of the public important water holes, springs and other bodies of water . . . ." H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916). This purpose was later embodied in Department of the Interior regulations.

3. The Department of the Interior Confirmed Its Earlier Interpretation Regarding Public Water Reserves in 1925.

In 1925, the Department of the Interior adopted regulations in *Circular No. 1028, Use of Lands Withdrawn As Public Water Reserves*, 51 I.D. 186 (1925), which were based on its decision in *State of Utah* and on the interpretation of the Stock Raising Homestead Act the Department advanced in Congress. That regulation provides, in part, as follows:

> 8. Each permit shall contain, beside those necessary in individual cases, the following conditions:
>
> A. **That the right to appropriate the waters of the State to the uses contemplated shall be obtained within one year from and after the issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.**

Id. 51 I.D. at 187 (emphasis added). Those regulations were later incorporated into the Code of Federal Regulations and remained in the code through 1976. 43 C.F.R. 292.10 through 292.17 (1938); 43 C.F.R. 2311.3 (1976).

4. The Department of the Interior Changed Its Position Regarding Public Water Reserves.

Notwithstanding these regulations, the position of the Solicitor regarding the effect of PWR 107 on the private appropriation of water changed after the filing of the United States' brief in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). The United States claimed in that litigation that it owned all the unappropriated water in the West that had not been previously acquired for private use. *Id.* at 611. In *Jack A. Medd,* 60 I.D. 83 (1947), the Solicitor followed the lead of the Department of Justice and concluded that the private appropriation of water under applicable state law from a spring within a public water reserve was invalid. The Solicitor stated:

> With regard to the question of the ownership of the unappropriated nonnavigable waters on the public domain, this Department adheres to the position that was taken by the executive branch of the Government in the case of *Nebraska v. Wyoming,* 325 U.S. 589, 611-616 (1945).

60 I.D. at 100; Exhibit 40. Since that time, the Solicitor has taken the position that the private appropriation of water under state law from springs within a public water reserve is not valid. *Compliance by the Department with State Laws Concerning Water Rights,* M-33969 (1950); Exhibit 30.

Paradoxically, the Department of the Interior never revised its regulations to reflect this change in legal position. Thus, an inconsistency exists in the position of the United States. After 1947, the Solicitor argued that a private appropriation of water under state law from a PWR 107 water source was not permissible. On the other hand, applicable regulations of the Department of the Interior in existence through 1976 required that a person appropriate water under state law to use water from a water source within a public water reserve.

5. Section 10 Expressly Provides for Public Use of Waters within Public Water Reserves.

A plain reading of section 10 demonstrates that Congress' intent was to make water on the reserved lands available for public use – not to reserve water for stockwatering. Moreover, the legislative history and contemporaneous history confirm the plain meaning of section 10. Congress undoubtedly had this contemporaneous executive branch interpretation about the effect of public water reserves in mind when it considered H.R. 407 in conference.

This Court has accorded "great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction. . . . " *Zuber v. Allen*, 396 U.S. 168, 192 (1969). Here, the Department of the Interior participated in the drafting of the SRHA and made known its views to Congress regarding the conference report on H.R. 407. 54 Cong. Rec. 642 (1916) (statement of Senator Thomas). Any ambiguity about the impact of section 10 on the private appropriation of water

from public water reserves should be resolved in favor of that administrative construction contained in *Circular No. 1028*. 396 U.S. at 192. The later position of the United States, reflected in *Nebraska v. Wyoming*, is not entitled to any weight since that opinion occurred many years after the enactment of the SRHA and since Congress did not consider that opinion when it enacted the SRHA.

In short, the language and history of the statutes upon which PWR 107 is based rebut any assertion that Congress intended to authorize or that the President did in fact reserve a water right under PWR 107 for stock-watering purposes. The superficial analysis of the Idaho Supreme Court completely ignored this history. It is therefore clearly erroneous and should be summarily reversed.

C. The Idaho Supreme Court Decision Conflicts with *United States v. New Mexico* Because It Concludes that PWR 107 is an Express Reserved Water Right.

The federal-state relationship regarding the use of water found in the "Great American Desert" has a long tumultuous history.[5] In *California v. United States*, 438 U.S. 645 (1978), this Court carefully reviewed the history of that relationship by beginning its review with the first federal statute addressing the use of water on the public domain – the Mining Act of 1866, ch. 262, 14 Stat. 251 and

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[5] This Court has long referred to the arid lands west of the 100th meridian of longitude as the "Great American Desert." *See California v. United States*, 438 U.S. 645, 648 (1978).

continued its analysis through the Reclamation Act of 1902, ch. 1093, 32 Stat. 388. The Court recognized that the consistent congressional resolution of conflicts regarding the use of water in the arid West was a policy of congressional deference to state water law. *California v. United States*, 438 U.S. at 653. In the companion decision in *United States v. New Mexico*, 438 U.S. 696, 702, n. 5 (1978), this Court noted that Senator Kuchel had collected a list of "37 statutes in which Congress has expressly recognized the importance of deferring to state water law. . . . " Indeed, the Court noted that "Congress has seldom expressly reserved water for use on these withdrawn lands." 438 U.S. at 699.

Despite the express purpose of section 10 to ensure that water would remain available for public use pursuant to state law, the Idaho Supreme Court embarked upon an analysis of PWR 107 that conflicts with the reserved water rights doctrine as articulated by this Court in *United States v. New Mexico*. The Idaho Supreme Court did not "carefully examine" the "asserted water right and the specific purposes for which the land was reserved. . . . " *Id.* at 700. Rather, the court ignored the express language of the SRHA and the legislative history and contemporaneous administrative interpretations. The court found persuasive an argument about a need for water associated with the Taylor Grazing Act, which was enacted many years after the SRHA.[6] Moreover, the court utterly failed to evaluate the purpose of this legislation in

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[6] The Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, was enacted over seventeen years after enactment of the SRHA.

light of the congressional policy of deference to state water law as required by *United States v. New Mexico.*

The use of water found on the public domain is an important issue throughout the West. In many instances, the only water supply for the surrounding population is from a source on the public domain. Thus, at the turn of the century, Congress passed several statutes that authorized the President to reserve certain lands containing water supplies necessary to the settlement of the West. Among those statutes were the Organic Administration Act of 1897, ch. 2, 30 Stat. 34, and the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 ("SRHA"). The two acts have striking parallels. The Organic Act authorized the President to reserve forest land for the purpose of ensuring a continuous flow of water for settlers homesteading surrounding lands. 30 Stat. 35. The SRHA authorized the President to reserve "lands containing water holes or other bodies of water needed or used by the public for watering purposes." 39 Stat. 865. Thus, both acts promoted settlement of the West.

As recognized by this Court in *United States v. New Mexico,* Congress, in authorizing the Organic Act, did not foresee any need for the federal government to allocate water among the settlers but, rather, deferred to state law the task of allocating these waters. 438 U.S. at 717, n. 24. In summarily rejecting the United States' claim for a stockwatering reserved water right for national forests, this Court stated:

> The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. New Mexico courts disagreed and held

> that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.
>
> While Congress intended the national forests to be put to a variety of uses, including stockwatering . . . **stockwatering was not itself a direct purpose of reserving the land**. . . . But Congress intended the water supply . . . to be allocated among private appropriators under state law. There is no indication in the legislative histories of any of the forest acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

438 U.S. 717 (emphasis added) (citation omitted) (footnotes omitted). The claim for stockwatering under PWR 107 based on the SRHA should be equally rejected. There is no intent expressed on the face of the statute to reserve water for livestock. While most certainly livestock was one of the intended uses, stockwatering was not itself a "direct purpose of reserving the land" under the SRHA. Rather, the express purpose of the SRHA was to carry out "the time-honored policy of this Government to use the public domain as far as possible to furnish homes for the citizens of our country." H.R. Rep. No. 35, 64th Cong. 1st Sess. 14-15 (1916). Section 10 furthered this policy by holding "open for the general use of the public, important water holes, springs, and other bodies of water" on the public domain. *Id.* at 18.

If the Idaho Supreme Court's decision becomes final, a most anomalous result occurs. The United States Bureau of Land Management will be allocating the water on the public water reserves for private stockwatering use. On

adjacent forest reservations, state law will be allocating the water for private stockwatering use in accordance with *United States v. New Mexico*. The purposes of the two acts do not justify such an anomalous result.

D. The Purpose for Creation of Public Water Reserve No. 107 would not be Entirely Defeated in the Absence of an Implied Federal Reserved Water Right.

The Idaho Supreme Court, in the alternative, also held that PWR 107 constituted an implied reserved water right as follows:

> The purpose of PWR 107 was to prevent monopolization by private individuals of springs and waterholes on public lands for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.

Appendix at App. 10. The decision resolves whether a federal reserved water right exists through an analytical approach inconsistent with rulings of this Court.

The implied-reservation-of-water doctrine is itself a canon of construction which is applied in the absence of any definitive congressional or executive statement about the reservation of water for a particular federal reservation. This canon of construction is an aid in divining congressional or executive intent regarding the reservation of water where Congress or the executive was silent on the issue. *Winters*, 207 U.S. at 576-577. Like all other canons of construction, it is not applicable in the face of

congressional or executive intent to the contrary. As earlier stated, the congressional endorsement of public water reserves in section 10 of the SRHA was based on an executive branch interpretation that the existence of a public water reserve did not preclude the private appropriation of water from water sources within the public water reserve. *Supra* at 11. There is nothing in the Act or legislative history to support an inference that stock-watering was a "direct purpose" of the SRHA. Thus, it is unnecessary to resort to the canon of construction regarding implication of a federal reserved water right from the *Winters* case. The intention of Congress and the executive branch is known, and it disclaims any intent to interfere with the private appropriation of water under state law from the water source within a public water reserve. *State of Utah*, 45 I.D. 551, 554 (1916). The Idaho Supreme Court had no basis to imply a federal reserved water right, and its alternative holding to that effect is directly inconsistent with the decision of this Court in *United States v. New Mexico*.

II. The Idaho Supreme Court Decision is Contrary to the Teachings of this Court and Would Establish a Federal System of Allocation of Water.

The United States has long eschewed and with much imagination has bitterly sought to undermine the long-standing policy of Congress to defer to state water law in the allocation of water supplies in the West. It has sought to promote a much larger role for itself – the executive branch. Thus, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the United States claimed it owned all the unappropriated water on the public domain. *Id.* 325 U.S. at 611. In

United States v. New Mexico, the United States claimed "that Congress intended the United States to allocate water to certain private users – in this case, cattle ranchers – outside the structure of state water law." 438 U.S. at 717, n. 24. In each case, this Court has summarily rejected the United States' attempt to undermine the congressional policy of deference to state water law.

In this case the United States asserts Congress intended for the Department of the Interior to allocate water to cattle ranchers. The United States found a receptive audience in the Idaho Supreme Court. The court stated:

> **We agree with the United States** and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right and **that the United States has the right to administer those water rights.**

Appendix at App. 9 (emphasis added). The court's decision portends a dramatic departure from this Court's doctrine and an undermining of congressional policy.

If the Idaho Supreme Court's decision becomes final, up to 11,000 new federal reserved water rights may be created on the 11.9 million acres of public domain in Idaho. Because of the early priority date for these new federal rights, many existing water rights established under state law will be displaced. The holders of those water rights will be forced to turn to the federal government for water. The United States will have the beginnings of a plenary federal system for control of water on the public domain. This change is inconsistent with 150 years of congressional policy of deferring to allocation of

water pursuant to state law. Thus, the Idaho Supreme Court's decision warrants review by this Court on this ground alone.

III. Review of This Decision or Summary Reversal for Consideration in Light of *United States v. New Mexico* Will Provide Guidance on the Many Other Federal Reserved Water Right Cases Pending in the SRBA and Will Assist Other State Adjudications.

The present case reflects a trend in the West. General adjudications of water rights under the authority of the McCarran Amendment, 43 U.S.C. § 666 (1994), are proceeding at an unprecedented rate. This is in large part due to the ever increasing demands on the limited water supplies. A determination of all rights is an essential first step in effective water management.

The State of Idaho commenced the Snake River Basin Adjudication in 1987. It includes 87% of the geographic area of the State, and various claimants filed over 170,000 claims. This total includes approximately 50,000 claims by the United States. This large number of federal claims is simply a product of the many federal reservations existing within the State where about 65% of the total area of the State is owned or administered by federal agencies. Idaho is responding to federal reserved water right claims for the following types of land reservations: (1) a national wildlife refuge, (2) national forests, (3) national recreation areas in two different parts of the state, (4) wild and scenic rivers for six different rivers, (5) three wilderness areas, and (6) pre-statehood and post-statehood reservations of lands on behalf of three different groups of Native Americans.

Idaho is not alone in attempting to deal with a large water rights adjudication. Montana has commenced a statewide adjudication of water rights. *In the Matter of the Adjudication of the Existing Rights to the Use of all the Water, Both Surface and Underground, with all Water Basins in the State of Montana,* Case No. WC-88-1. Arizona has two major separate ongoing water right adjudications involving the Gila River and the Little Colorado River. *In Re: The General Adjudication of all Rights to Use Water in the Gila River System and Source,* Maricopa County Superior Court No. W-1, W-2, W-3 W-4 (Consolidated); *In Re: The General Adjudication of all Rights to Use Water in the Little Colorado River System and Source,* Apache County Superior Court No. 6417. Washington and Oregon also have substantial adjudication efforts. *Washington v. Acquavella,* Yakima County Superior Court No. 77-2-01484-5; *In the Matter of the Determination of the Relative Rights to the Use of the Waters of Klamath River and Its Tributaries Pending Before Oregon Water Resources Department.* As with Idaho's adjudication, the federal government is the major claimant in each of these adjudications and is pressing to expand the reserved water rights of the United States.[7]

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[7] The Colorado Supreme Court is the only other state court of last resort that has reviewed the claim for a federal reserved water right under PWR 107. In a superficial analysis, the Colorado Supreme Court also concluded that PWR 107 created a federal reserved water right. *United States v. City and County of Denver,* 656 P.2d 1, 32 (Colo. 1983). In this case, the Idaho Supreme Court followed much of the analysis of the Colorado Supreme Court.

While each reservation includes some issues peculiar to the particular reservation, they all turn upon the application of this Court's doctrine. Each is based on an examination of executive or congressional documents to determine whether to imply a reserved water right under the *Winters v. United States* doctrine or as an express reserved water right. Each of the federal reserved water right cases pending in Idaho District Court present the issue of the materiality of statements made near the time of the creation of the individual reservation or the addition of statutory authority for later executive withdrawal.

In addressing all federal reserved water right cases, this Court has focused in its decision on the language of the relevant statute or reserving document and on documents contemporaneous with the creation of the particular reservation. *United States v. New Mexico*, 438 U.S. at 707-708; *Cappaert v. United States*, 426 U.S. 128, 132 (1976). The Idaho Supreme Court's decision proceeds in a completely new direction. It ignores the express language of the SRHA and the most probative contemporaneous document, the decision of the Assistant Secretary of Interior in *State of Utah*. Instead, the Idaho Supreme Court focuses on water allegedly needed as a result of legislation enacted many years after the statutory authority for the creation of the public water reserves.

Absent some clarification by this Court, state courts in Idaho and throughout the West will struggle with how to apply the federal reserved water rights doctrine. If the Idaho Supreme Court is correct, then lower courts and the parties need to refocus their presentation of evidence about the existence of a federal reserved water right on more current needs of the individual federal reservations.

If, on the other hand, the State of Idaho is correct, then the existence of the federal reserved water right will turn on an examination of documents contemporaneous with the creation of the reservation. Clarification is needed on this issue to provide guidance to the Idaho Court as well as the courts of other Western states.

CONCLUSION

The State of Idaho respectfully requests that the petition for a writ of certiorari be granted. In the alternative, the State of Idaho requests this Court to summarily reverse the Idaho Supreme Court's decision for further consideration in light of *United States v. New Mexico*, 438 U.S. 696 (1978).

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 23587

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.	Twin Falls, Nov. 1997 Term
UNITED STATES OF AMERICA, Appellant, v. STATE OF IDAHO; J. R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R. J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER, Respondents.	1998 Opinion No. 41 Filed: April 6, 1998 Frederick C. Lyon, Clerk

Appeal from the District court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

Adjudication order denying a claim by the United States that it holds a reservation of water rights on federal land for stockwatering purposes, *reversed*.

Betty Richardson, United States Attorney, Boise; William B. Lazarus, Department of Justice, Washington, D.C.; Randall J. Bramer, Department of Justice, for appellant United States of America. William B. Lazarus argued.

Hon. Alan C. Lance, Idaho Attorney General; Clive Strong, Deputy Attorney General; David J. Barber, Deputy Attorney General, Boise, for respondent State of Idaho. David J. Barber argued.

Terry T. Uhling and Shawn D. Ysursa, Boise, for respondent J.R. Simplot, Co. Shawn D. Ysursa argued.

WALTERS, Justice

This appeal raises a question of federal law within the Snake River Basin Adjudication (SRBA), a suit in the district court for the general adjudication of water rights in the Snake River water basin. The dispute in the instant action concerns a claim by the United States that it has a federal reserved water right for all springs and waterholes which are located on lands withdrawn from the public domain. The claim is predicated upon an executive order issued in 1926, entitled Public Water Reserve No. 107 (PWR 107). The SRBA court held that PWR 107 did not create a valid basis for a federal reserved water right, and the United States has appealed. We conclude that PWR 107 provides a valid reservation of water rights by

the federal government for the limited purpose of stock-watering by permittees under the Taylor Grazing Act and, accordingly, reverse the order of the SRBA court.

I.

FACTS AND PROCEDURAL BACKGROUND

The United States filed over 11,000 claims in the SRBA asserting a reserved water right pertaining to PWR 107. On November 5, 1995, one of the parties to the adjudication filed a motion to designate the alleged reserved right under PWR 107 as a basin-wide issue. On March 8, 1996, the SRBA district court entered an order granting the motion. The order designated the question: "Whether Public Water Reserve 107 is a valid basis for a federal reserved water right?" as Basin Wide Issue No. 9.

Following briefing and argument, the SRBA court entered its decision and order on December 9, 1996. The court determined that PWR 107 was issued to prevent the control of adjacent land through monopolization of water sources by individual homesteaders who are allowed to settle on the public domain. The court further held that the purpose of PWR 107 was to reserve the land immediately surrounding springs and waterholes to ensure that water would remain available for public use and appropriation, but that PWR 107 did not expressly or impliedly reserve water or appropriate water for use by the United States. In addition, the SRBA court essentially concluded that if there was an implied reservation of the right to water in order to carry out the purposes of PWR 107, that right no longer existed as a result of the enactment by Congress in 1976 of the Federal Land Policy and

Management Act (FLPMA). Therefore, the SRBA court concluded that PWR 107 was not a valid basis for a federal reserved water right in the SRBA. The decision was certified as final under Idaho Rule of Civil Procedure 54(b), allowing the United States to pursue this appeal.

II.

PWR 107 AS A BASIS FOR A FEDERAL RESERVED WATER RIGHT.

A. Federal Reserved Water Rights in General.

The federal reserved water rights doctrine arises from the decision of the United States Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court held that when Congress established an Indian reservation, it also, by implication, reserved the water rights necessary to achieve the reservation's purpose. In a later case, the Court explained:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian

> reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976). The doctrine of reserved water rights has been extended to include public lands reserved for a particular governmental purpose, such as the creation of parks, wildlife refuges, and national forests.

The reserved right is not without limitation, however. The Court in *Cappaert* also advised that "[t]he implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). Furthermore, if "water is only valuable for [sic] secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). The necessity of water must be so great that without the water the reservation would be "entirely defeated." *Id.* at 700. Therefore, where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

B. Public Water Reserve 107.

We thus turn to an examination of PWR 107, together with its enabling legislation and the circumstances and history surrounding its creation, to determine whether a federal reserved water right exists in the present case. In 1926, President Calvin Coolidge signed the executive order entitled "Public Water Reserve No. 107." PWR 107 provides:

> [I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

The authority for withdrawals under PWR 107 is provided in the December 29, 1916, statute known as the Stock Raising Homestead Act (SRHA) and in the Pickett Act of 1910.[1] The first piece of enabling legislation for PWR 107 was the withdrawal provision of the Pickett Act, which was incorporated by reference in the SRHA of 1916. The Pickett Act, 43 U.S.C. § 141, provided:

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[1] Sections 300 and 141 of the SRHA and the Pickett Act, respectively, were repealed by the Federal Land [sic] Management Act (FLPMA), Pub.L. 94-579, 905 [sic] Stat. 2744 [sic] (1976) (codified at 43 U.S.C. §§ 1701 *et seq.* (1986)). However, the FLPMA provided that all withdrawals in force on the date of enactment of FLPMA shall remain in force until specifically changed in accordance with FLPMA.

> [T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

In short, the Pickett Act of 1910 provided the President with the broad discretion to temporarily withdraw lands and reserve such lands for public purposes. Subsequently, Congress enacted the SRHA of 1916, which authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes, and delegated the management of such lands to the Secretary of the Interior. Section 10 of the SRHA of 1916, 43 U.S.C. § 300, states:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

The Committee Report on the SRHA of 1916 noted:

> This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public,

> important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that *a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.* [Emphasis in original.]

H.R.Rep. No. 35, 64th Cong., 1st Sess. 18 (1916), *quoted in United States v. City and County of Denver*, 656 P.2d 1, 31 n. 48 (Colo.1982).

Following adoption of the SRHA of 1916, the Secretary of the Interior prepared PWR 107 as a proposed executive order for the President. The order was transmitted to President Coolidge by the Secretary on April 17, 1926, together with a letter stressing to the President the need to prevent the monopolization of public grazing lands by private individuals controlling the water. The Secretary's letter recited:

> The control of water in the semi-arid regions of the west means the control of the surrounding grazing areas, possibly in some regions millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain the title to and supervision of such spring and water holes on the unreserved public domain as have not already been appropriated.[2] [Footnote added.]

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[2] The Secretary's acknowledgement of pending legislation which would allow grazing leases on unreserved land in the public domain was in reference to what later became known as the Taylor Grazing Act. 43 U.S.C. §§ 315 *et seq.* (1934).

On the same day, April 17, 1926, President Coolidge issued PWR 107 withdrawing all unreserved public land containing a spring or waterhole as stated.

After considering the plain and ordinary words of the enabling statutes and executive order underlying PWR 107, we conclude that PWR 107 evidences an express intention by Congress that reserves a water right in the United States.

C. Nature of Reserved Right

In the present case, the United States has limited its claim for a reserved water right to stock water consumption. The United States asserts that the purpose of PWR 107 is to reserve water for public use and appropriation as a source for permittees under the Taylor Grazing Act. The United States persuasively argues that such a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes. The United States further points out that if the water is available for private appropriation, then individuals could monopolize the water rights for their permanent, exclusive use, thereby precluding stockwatering access to those holding grazing permits for those lands.

We agree with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right and that the United States has the right to administer those water rights. Both the legislative history surrounding the SRHA

of 1916 and the SRHA itself provided the Department of the Interior with the "authority to regulate public springs and water holes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply." *United States v. City and County of Denver*, 656 P.d [sic] at 31. In addition, the letter from the Secretary of the Interior to the President, which was written in contemplation of the then pending Taylor Grazing Act of 1934, stated that the purpose of PWR 107 was to "retain the title to and supervision of such springs and water holes." These springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of Interior. To hold otherwise would be in contravention of the policy of this state "to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering. Without the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes. Furthermore, the administration of the reserved water rights for consumption by grazing animals on land managed by the federal government may simplify the SRBA proceeding because the priority date for all of the Taylor Grazing rights would be the same date, April 17, 1926, which is the date of withdrawal pursuant to PWR 107.

D. The Effect of FLPMA.

The United States argues also that the SRBA district court incorrectly concluded that the purpose of PWR 107 was abrogated by the passage of FLPMA in 1976. The United States contends that, instead, this Court should follow the decision of the Colorado court in *United States v. City and County of Denver, supra*, holding that the enactment of FLPMA had no effect on the reserved water rights created by PWR 107. 656 P.2d at 31, n. 47. We agree.

In 1976, with the enactment of FLPMA, Congress limited the authority for future withdrawals of land from the public domain by the Executive Branch. However, FLPMA provided a savings provision that stipulates: "All withdrawals, reservations, classifications, designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." 43 U.S.C. historical note § 1701.

In short, the FLPMA itself stipulated that withdrawals and reservations existing at the time of its enactment shall remain in effect. Therefore, PWR 107 reserving water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.

III.

CONCLUSION

We hold that PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering. In addition, we conclude that the United States

has the right to administer such water rights on the public lands managed under the Taylor Grazing Act. Furthermore, we conclude that the passage of FLPMA does not affect the PWR 107 withdrawals. Accordingly, the district court's order on Basin-Wide Issue No. 9 is reversed.

No costs are awarded on appeal.

Chief Justice TROUT, and Justices JOHNSON, SILAK and SCHROEDER, **CONCUR**.

APPENDIX B

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

In Re SRBA	)	**Case No. 91-00009**
Case No. 39576	)	
	)	**MEMORANDUM DECISION**
	)	**AND ORDER RE:**
	)	**BASIN-WIDE ISSUE 9**

Daria Zane, United States Department of Justice,
for the United States
David Barber, Deputy Attorney General,
for the State of Idaho
Terry Uhling for J.R. Simplot
Wiley F. Smith, *Pro se*
Jerry L. Hoagland, *Pro se*
Young Harvey Walker, *Pro se*
William J. Brockman, *Pro se*

I. PROCEDURAL HISTORY

Basin-Wide Issue 9 was designated by the court on the motion of Mitchell D. Sorensen and Young Harvey Walker, appearing *pro se* (***Order Designating Basin-Wide Issue No. 9***, Mar. 8, 1996). The issue presented by Basin-Wide Issue 9 is:

> **Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.**

Public Water Reserve (PWR) 107[1] withdraws from entry public lands which surround water sources in order

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[1] Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

to keep homesteaders from controlling large land tracts by settling around the only water supply available for public use.

The position of the United States is that PWR 107 reserves that amount of water necessary to fulfill the purpose of the reservation. The State of Idaho (State), J.R. Simplot, Wiley Smith, Jerry Hoagland, Young Harvey Walker and William J. Brockman (collectively "the Opponents") contend that if PWR 107 reservations exist in Idaho, the reservations are of land and do not expressly or impliedly include water.

II. DECISION

Basin-Wide Issue 9 is resolved by determining whether PWR 107 creates either an express or implied reservation of water for use by the federal government. The first inquiry is whether PWR 107 creates an express reservation of water. To make this determination, the court is required to look at the plain and ordinary words of the enabling legislation and acts of the President creating the PWR 107 reservations. *Cappaert v. United States*, 426 U.S. 128 (1976); *Rim View Trout Company v. Higginson*, 121 Idaho 819, 822, 828 P.2d 848 (1992).

The authority to make PWR 107 reservations was derived from two acts of Congress, the Pickett Act of 1910 and the Stock Raising Homestead Act (SRHA) of 1916. The Pickett Act authorized the President to make withdrawals of land for public purposes as provided in Section One:

> That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of

> the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by Act of Congress.

Act of June 25, 1910, ch. 421, 36 Stat. 847, codified at 43 U.S.C. § 141 (1976).

Following the Pickett Act's grant of general authority to make land reservations, Congress adopted the SRHA to specifically address withdrawals of land in relation to homesteading. The purpose of the SRHA was to:

> Authorize[s] the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country; **so that a person can not monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.**

H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916) (emphasis added).

To implement the general purposes of the SRHA, Section Ten provided:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the [Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so

> reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976).

On April 17, 1926 President Calvin Coolidge issued PWR 107 under his authority derived from the Pickett Act and the SRHA:

> [I]t is hereby ordered that every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

Trial Exhibit 19 attached hereto; *see* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302 Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)).

The plain and ordinary words of the Pickett Act and the SRHA express the Congressional intent to ensure the implementation of its policy of promoting Western settlement by members of the public. Congress recognized that full settlement of Western lands would be prohibited where one homestead was strategically established to surround a water source of sufficient quantity to be used for the benefit of additional potential homesteads nearby. Such strategically placed homesteads would then be able

to control the water source and prevent homesteading on large areas of land. This occurrence would be contrary to federal settlement policy which sought to maximize Western land use.

PWR 107 was issued to prevent control of water sources by individual homesteaders and subsequent control of adjacent land. Its express purpose was to reserve the land immediately surrounding water sources to ensure that water would remain available for public use and appropriation. PWR 107 was not an express appropriation of water for use by the United States government.[2] The express intention of PWR 107 was to protect the availability of water sources for settlement or homesteading by members of the public who could take public land and put it to private use. Concomitantly, the homesteaders would appropriate the water so protected and place it to private use. In this manner, PWR 107 advanced federal settlement policy. The use of the water in protected sources by the federal government was neither contemplated by Congress nor was it necessary to carry out the express purpose of PWR 107 reservations.

The next inquiry is whether PWR 107 land withdrawals include implied reservations of water for use by the federal government. An implied reservation exits [sic] when water is "needed to accomplish the purpose of the reservation." *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978) (citing *Cappaert v. United States*, 426 U.S. 128 (1976)). The necessity to support a federal reservation

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[2] *See also, United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1980) (PWR 107 does not expressly state an intention to reserve water in public springs or water holes).

must be such that without water the purpose of the land reservation would be "entirely defeated." *Id.* at 700. Federal reservations can only reserve an "amount of water necessary to fulfill the purpose of the reservation, no more." *Id.*

The United States' position is that without a water reservation, it is still possible for an individual to control the entirety of a water supply thereby defeating the purpose of the reservation. This court disagrees. The view that, but for a federal reservation, water on public land may be monopolized assumes no sovereign entity controls or regulates the appropriation of water from that source. This assumption fails because the United States Supreme Court has ruled that the state both controls and regulates that appropriation of all nonnavigable water within its borders.

> **What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named,** with the right in each to determine for itself to what extent the rule of appropriation or [sic] common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935) (citation omitted) (emphasis added); *see also*, I.C. § 42-101; *California v. United States*,

438 U.S. 696 [sic] (1978); *United States v. New Mexico; Cappaert v. United States.*[3]

The United States' position that PWR 107 impliedly reserves water is contrary to law and would effectively shift control over the appropriation of nonnavigable waters from the state to the federal government. Accepting that PWR 107 impliedly reserved water in addition to expressly reserving land would constitute a complete reallocation of federal and state sovereignty with respect to the appropriation of nonnavigable waters. It would be a feat of legal gymnastics to read the Pickett Act and the SRHA as a Congressional declaration for the federal takeover of state sovereignty over the appropriation of its nonnavigable waters. The practical effect of the United States' position would be to remove water within PWR 107 reserves from appropriation under state law. Water within a PWR 107 reserve would then be allocated by the United States. This has been the position of the Interior Solicitor.

> After the [1926] withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. **The permitting process**

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[3] This state's control extends to water sources located on the public domain. *See e.g., Lemmon v. Hardy,* 95 Idaho 778, 780, 519 P.2d 1168 (1974) ("The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property in [sic] invalid."); *Short v. Prasiewater,* [sic] 35 Idaho 691, 208 P.2d [sic] 844 (1922) and *Keiler v. McDonald,* 37 Idaho 573, 218 P. 365 (1923) (Spring water situated wholly on public land is subject to appropriation).

> **allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purpose of the reservation.**

86 Interior Dec. 580, 581 (Dept. of Interior 1979) (emphasis added).[4]

Implicit to the Interior Solicitor's opinion is the erroneous assumption that absent a reservation, the public interest in water sources falling within PWR 107 reservations receives no sovereign protection. This assumption is contrary to well-established law. The Idaho Supreme Court explicitly set forth the state's duty to oversee the public interest in water rights:

> 'All the water [sic] of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose. . . . ' I.C. § 42-101. This expressed policy of the legislature is in harmony with Idaho Const. art. 15, § 1. Such interest or title is not 'in the proprietary sense, but rather in the sovereign capacity as representative of all the

---

[4] The opinion of the Interior Solicitor in 1979 is directly contrary to an opinion rendered by the Assistant Secretary of the Interior in 1916 which was issued contemporaneously with the SRHA. In that opinion, the Assistant Secretary commented that water contained in a land reservation could be appropriated under state law. 45 Pub.Lands Dec. 551, 554 (1916). This statement recognizes traditional western water law in which the states are accorded control of the appropriation of nonnavigable waters.

> people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.'

Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61 (1960) (citations omitted); *see also*, I.C. § 42-101.

The "public interest" is a broad concept encompassing a wide range of concerns. As identified by the Idaho Supreme Court one such concern is the recognition by the State of Idaho that water is a "common necessity" which needs to be protected for all people. In other words, the State of Idaho has acknowledged the importance of preventing the monopolization of water. Therefore, as to private rights to the use of water, it is the state, not the federal government, that determines whether or not a particular use serves the public interest. To find otherwise would create dual systems for the appropriation and management of water and contravene the long-established and well-settled law governing the appropriation of nonnavigable waters.

In conjunction with the law establishing state plenary control of nonnavigable water sources, the federal government may obtain reserved rights when, and only when, the reservation serves some *federal* purpose. *United States v. New Mexico*, 428 [sic] U.S. at 700. However, implied reservations cannot be found where the reservation is intended to benefit only those individuals operating on the public lands for their own private purpose. Professor Getches makes the clearest statement of this principle:

> Persons using the public lands for private purposes do not exercise reserved water rights and

> must perfect water rights in accordance with applicable state law. Reserved rights can arise only when public land is reserved – withdrawn from entry and dedicated to a specific federal purpose – and may be exercised by private individuals only when they are engaged in activity that fulfills the federal purpose. **Consequently it is necessary to distinguish between those who use "open" public lands for their own purposes and those who function on reserved lands primarily to carry out the federal purposes of the reservation. . . .**
>
> **Ordinarily lessees and permittees use public or Indian lands for their own purposes and must establish their own water rights under state (or tribal) law.**

DAVID H. GETCHES, WATER LAW 326-327 (2nd ed. 1990) (emphasis added).

In this case, the land containing certain water sources was reserved under PWR 107 so that other homesteaders or stockmen could use the water located within the reservation. *See infra,* H.R. Rep. No. 36 [sic], 64th Cong., 1st Sess 18 (1916). Presumably, none of these users would be using the water for any *public* purpose. Rather, those using water located within a PWR 107 reserve would be doing so for their own *private* purpose. The private use of water within a PWR 107 land reserve does not further a specific federal purpose as is typical of reservations where water use itself furthers a defined federal purpose.

Further, it now appears that the purpose of PWR 107 reservations was abrogated by the passage of the Federal Land Policy and Management Act (FLPMA) of 1976, Pub.L. 94-579, 90 Stat. 2743, codified at 43 U.S.C.A. § 1701, *et seq.* (1986). Under FLPMA, Congress declared

that "the public lands be retained in federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." *Id.* While FLPMA did not repeal reservations or withdrawals that existed prior to its passage (*see*, Savings Provision § 701 of Pub.L. 94-579, found at 43 U.S.C.A. § 1701n.(c) (1986)), its adoption has significance as it relates to the required necessity in order to find an implied reservation of water under PWR 107.

With the passage of FLPMA, Congress repealed nearly all land disposal laws including those relating to homesteading. *See*, 43 U.S.C.A. § 161, *et seq.* (1986), repealed by Pub.L. 94-579, Title VII, § 702, October 21, 1976, 90 Stat. 2787. Consequently, the specific concern with homesteaders strategically homsteading [sic] around water sources thereby monopolizing large tracts of land has vanished and with it the policy issue underlying the United States' claim of necessity for a reservation of water under PWR 107. This opinion is shared by some within the Bureau of Land Management.

> The original intent of Public Water Reserve withdrawals was to protect selected parcels of public land which contained sufficient water to provide for public use. With the passage of FLPMA, laws relating to land disposal have been repealed to the extent it is no longer necessary to protect undeveloped parcels of public land for the above-stated purpose.

Memorandum to State Director from District Manager, Boise District, dated May 13, 1980.[5]

Implied reservations exist only so long as necessary to serve the purpose of the reservation. *See, e.g., In Re Big Horn Adjudication,* 899 P.2d 848, 854 (1995).[6] Where the necessity for the reservation no longer exists, the implied reservation terminates. Implied reservations should not continue for eternity to serve an interest that no longer exists.

In analyzing PWR 107 reserves, both this court and the Colorado Supreme Court rely on the factors set forth in *Cappaert v. United States* and *United States v. New Mexico.* However, the Colorado Supreme Court found that PWR 107 reservations contain an implied reservation of water "minimally" necessary to serve the purpose of the reservation. *United States v. City and County of Denver,* 656 P.2d 1, 32 (Colo. 1980). While agreeing with its analysis, this court respectfully disagrees with the Colorado court's conclusion. The Colorado court determined that the purpose of the reservation was to provide "watering supply for animal and human consumption." *Id.* at 31.

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[5] *See contra,* pre-FLPMA Interior Decision, *Jack A. Medd,* 60 Interior Dec. 83, 96 (Dept. of Interior 1947).

[6] *In Re Big Horn Adjudication* involved a case in which certain Tribes ceded their land to the United States for sale. The Wyoming Supreme Court held as follows: "[T]he reserved water right disappeared because the purpose for which it was recognized no longer pertained. That purpose no longer existed for lands acquired by others after they had been ceded to the United States for disposition. The effect is that the reserved water rights were eliminated as to those tracts." *In Re Big Horn Adjudication,* 899 P.2d at 854.

Such a purpose does not give rise to an implied reservation of water by the federal government for its use. Where water within a reservation is to be used by private individuals for private purposes, those private users must obtain a water right under state law. In light of the private purpose of the use of the water, the Colorado Supreme Court did not consider the effect of the purported reservation of water on the well-established principles of Western water law regarding the states' plenary control over the appropriation of nonnavigable waters. Finally, while the Colorado court discussed FLPMA, it did not consider FLPMA's effect on the necessity of the reservation.

In conclusion, it is held that implied reservations of water were never necessary to serve PWR 107 land withdrawals. The express purpose of a PWR 107 reservation was to prevent the monopolization of land. So long as the United States may reserve land surrounding water sources, the purpose of the reservation is served. The purpose of the reservation is not "entirely defeated" without water. No federal purpose would be served by an implied reservation of water. Consequently, this court does not find an implied reservation.

Consistent with the reasons stated above, the court finds that PWR 107 does not contain either an express or implied reservation of water.[7]

---

[7] The Opponents also argue that PWR 107 reservations do not constitute "blanket" withdrawals. With the determination that PWR 107 reservations do not include water, there is no need to address the issue of "blanket" withdrawals.

IT IS SO ORDERED.

DATED December 9, 1996.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

Exhibit 19

Public Water Reserve No. 107

[Handwriting Illegible]

ORDER OF WITHDRAWAL

PUBLIC WATER RESERVE NO. 107

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases", as amended by act of Congress approved August 24, 1912 (37 Stat., 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions

of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

(Sgd) CALVIN COOLIDGE
President

April 17, 1926

Two carbons to General Land Office

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER RE: BASIN-WIDE ISSUE 9 was mailed on December 9, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Court Certificate of Mailing for Basin-Wide Issue 9

/s/ Illegible
Deputy Clerk

APPENDIX C

In the Supreme Court of the State of Idaho

IN THE MATTER OF SRBA CASE NO. 39576 BASIN-WIDE ISSUE #9 (PWR 107) ENTERED DECEMBER 9, 1996.

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF IDAHO; J.R. SIMPLOT CO.; LEMHI IRRIGATION CO.; DAVE NELSON, LOLA COATES, SAN FELIPE RANCH; HARRY R. BASS; TED S. BLACKSTOCK; RICHARD BRANDAU; WILLIAM J. BROCKMAN; MICHAEL F. HANLEY, IV; JERRY L. HOAGLAND; THOMAS BALLMAN HOOK; TIM LOWRY; BILL LOWRY; PAUL NETTLETON; R.J. SMITH; WILEY F. SMITH; MITCHELL D. SORENSON; ROBERT THOMAS; YOUNG HARVEY WALKER,

Respondents.

AMENDED ORDER DENYING RESPONDENT JERRY HOAGLAND'S PETITION FOR REHEARING

NO. 23587
Ref. No. 98RH-12

Respondent, Jerry Hoagland, having filed a PETITION FOR REHEARING on April 27, 1998 and a supporting BRIEF on May 11, 1998, seeking review of the Opinion of the Supreme Court filed April 6, 1998; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent, Jerry Hoagland's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 15th day of October, 1998, nunc pro tunc July 29, 1998.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Judge Daniel C. Hurlbutt

Supreme Court, U.S.
FILED
JAN 27 1999
CLERK

Nos. 98-684 and 98-706

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY L. HOAGLAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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2588

QUESTION PRESENTED

Whether an executive order entitled Public Water Reserve No. 107, 43 C.F.R. 292.1 (1938), created a federal reserved water right to satisfy the stock watering needs of persons who graze livestock on public lands.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546 (1963)	12
Buford v. *Houtz*, 133 U.S. 320 (1890)	2
California v. *United States*, 438 U.S. 645 (1978)	12
Cappaert v. *United States*, 426 U.S. 128 (1976)	9, 12, 13
Light v. *United States*, 220 U.S. 523 (1911)	3-4
New Mexico v. *Molybdenum Corp. of Am.*, CIV 9780-SC (D.N.M. June 11, 1992)	11
Snake River Basin Water Sys., In re, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989)	8
The General Adjudication of Rights to Use of Water from the Snake River Drainage Basin Water System, In re, No. 39576 (Idaho Dist. Ct. Jan. 17, 1989)	19
United States v. *City & County of Denver*, 656 P.2d 1 (Colo. 1982)	10, 11, 13
United States v. *Idaho*, 508 U.S. 1 (1993)	2, 8
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915)	4
United States v. *New Mexico*, 438 U.S. 696 (1978)	4, 12, 13, 17
United States v. *Payne*, 8 F. 883 (W.D. Ark. 1881)	4
United States v. *Wilbur*, 283 U.S. 414 (1931)	4
Winters v. *United States*, 207 U.S. 564 (1908)	9, 12

Constitution, statutes, regulations and rule: Page

U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause) 3
Antiquities Act of 1906, 16 U.S.C. 431 4
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 *et seq.* 4
§ 204, 90 Stat. 2751, 43 U.S.C. 1714 (1976) 4
§ 701(c), 90 Stat. 2786, 43 U.S.C. 1701 note 5, 18
§ 704, 90 Stat. 2792 4
Federal Power Act, 16 U.S.C. 818 4
McCarran Amendment, 43 U.S.C. 666 ..... 2, 8
Organic Administration Act, 16 U.S.C. 473 *et seq.* 17
Pickett Act, ch. 421, 36 Stat. 847, 43 U.S.C. 141 (repealed 1976) 4
Sanctuaries Act, 16 U.S.C. 694 4
Stock Raising Homestead Act, ch. 9, 39 Stat. 862, 43 U.S.C. 291 *et seq.* 3
§ 10, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976) 3, 5 6, 13, 14, 16, 17
Taylor Grazing Act, 43 U.S.C. 315 *et seq.* 2
16 U.S.C. 21 4
Idaho Code (1990):
§ 42-501 18
§ 42-1406A(1) (& Supp. 1998) 8
Public Water Reserve No. 107, 43 C.F.R. 292.1 (1938) ..... *passim*
43 C.F.R. 292.2 (1938) 7, 15
Sup. Ct. R. 10 11

Miscellaneous:

H.R. Rep. No. 35, 64th Cong., 1st Sess. (1916) 5, 13, 14, 17
Improvement and Regulations of Grazing on the Public Lands of the United States: Hearings on H.R. 19857 Before the House Comm. on Public Lands, 62d Cong., 2d Sess. (1912) 5

Miscellaneous—Continued: Page

Letter from First Ass't Secretary Edward Finney to Senator John Kendrick (May 5, 1926) (on file with Department of Interior, Central Classified Files 1907-1936, File 2-188, National Archives, College Park, Md.) 16

Letter from Secretary of the Interior Work to President Coolidge (Apr. 17, 1926) 6, 16

Nevada State Engineer's Notice and Order Fixing and Setting Time and Place for Inspection, *In re the Determination of the Relative Rights in and to the Water of Southern Monitor Valley in Nye County, Nevada* (Feb. 15, 1996) 11

Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended, Circular No. 1066, 51 Interior Dec. 457 (1926) 7, 15

Compliance by the Department with State Laws Concerning Water Rights, Sol. Op. M-33969 (Interior Dec. Nov. 7, 1950) 7

Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, Sol. Op. M-36914, 86 Interior Dec. 553 (1979) 8

Purposes of Executive Order April 17, 1926, Establishing Public Water Reserve No. 107, *Sol. Op. M-36914 (Supp. II)*, 90 Interior Dec. 81 (1983) 8

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-684

STATE OF IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 98-706

JERRY L. HOAGLAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App.[1] 1-12) is reported at 959 P.2d 449. The opinion of the district court (Pet. App. 13-27) is unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on April 6, 1998. A petition for rehearing was

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[1] Citations to "Pet. App." are to the appendix in No. 98-684.

initially denied on July 29, 1998, and the Idaho Supreme Court issued an amended order to that same effect on October 15, 1998, "nunc pro tunc July 29, 1998" (Pet. App. 29). The petition for a writ of certiorari in No. 98-684 (Idaho Pet.) was filed on October 26, 1998. The petition for a writ of certiorari in No. 98-706 (Hoagland Pet.) was filed on October 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Petitioner State of Idaho has initiated a general stream adjudication of the Snake River Basin and has joined the United States as a defendant under the McCarran Amendment, 43 U.S.C. 666. See *United States* v. *Idaho*, 508 U.S. 1 (1993). In the course of this litigation, known as the Snake River Basin Adjudication (SRBA), the United States and other parties have filed numerous water rights claims, and the district court has identified and resolved some of the issues that involve "Basin-wide" concern. Among the claims filed, the United States has asserted federal reserve water rights for stockwatering purposes based on an executive order known as the Public Water Reserve No. 107 (PWR 107), 43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95. The district court rejected those claims on the ground that PWR 107 did not reserve a water right. Pet. App. 13-27. The Idaho Supreme Court reversed the district court's ruling. *Id.* at 1-12.

1. The public lands of the United States have long been used for grazing livestock, first as a "public common," *Buford* v. *Houtz*, 133 U.S. 320, 326-328 (1890), and later as rangelands that are actively managed pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Even during the era of the grazing common, the federal government enacted statutes and issued execu-

tive orders to protect the use of the rangelands. One of these executive orders is PWR 107, issued by President Coolidge on April 17, 1926. It states:

ORDER OF WITHDRAWAL

PUBLIC WATER RESERVE NO. 107

> [E]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole, located on unsurveyed public land, be and the same is hereby, withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the Act of December 29, 1916.

43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95.[2]

a. Reservations have long been used by the United States to dedicate federal lands to specified public uses. The federal government's authority to make reservations and withdrawals from the public lands derives from the Property Clause of the Constitution, U.S. Const. Art. IV, § 3, Cl. 2, which provides that Congress shall have the power to dispose of and make all needful laws regarding the property belonging to the United States. See, *e.g.*, *Light* v. *United States*, 220 U.S. 523

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[2] The statute cited at the end of the order is the Stock Raising Homestead Act (SRHA), 43 U.S.C. 291 *et seq.* Section 10 of the SRHA authorized the President to reserve lands "containing water holes or other bodies of water needed or used by the public for watering purposes." Ch. 9, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976).

(1911).[3] Some reservations, such as those for national parks, have been created by Acts of Congress. See, *e.g.*, 16 U.S.C. 21. Many other reservations, however, including reservations for national forests, wildlife refuges, and the public water reserve at issue here, have been created by presidential executive order. See *United States* v. *Payne*, 8 F. 883 (W.D. Ark. 1881).

Until 1976, the President had extremely broad statutory authority to withdraw and reserve public lands.[4] Congress curtailed much, but not all, of that statutory authority through the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.* See FLPMA, Pub. L. No. 94-579, § 704, 90 Stat. 2792; see also § 204, 90 Stat. 2751, 43 U.S.C. 1714 (1976). At that time, Congress limited the Executive Branch's authority to make future withdrawals. The savings provision in FLPMA stipulated, however, that withdrawals and reservations existing at the time of its

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[3] A "withdrawal" removes public lands from availability for private acquisition. See *United States* v. *Wilbur*, 283 U.S. 414, 419 (1931); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471 (1915). A "reservation" is the dedication of withdrawn land to a specified purpose. See *United States* v. *New Mexico*, 438 U.S. 696 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976).

[4] In numerous Acts, Congress had delegated to the Executive Branch both general and specific withdrawal and reservation authority. Some examples of specific authority include the Antiquities Act of 1906, 16 U.S.C. 431, the Federal Power Act, 16 U.S.C. 818, and the Sanctuaries Act, 16 U.S.C. 694. Congress provided a general grant of withdrawal authority in 1910 with the enactment of the Pickett Act, ch. 421, 36 Stat. 847, 43 U.S.C. 141 (repealed 1976). The President could also make lawful withdrawals without express statutory authority. See *United States* v. *Wilbur*, 283 U.S. at 419; *United States* v. *Midwest Oil Co.*, 236 U.S. at 469-471.

enactment remain in effect. FLPMA § 701(c), 90 Stat. 2786, 43 U.S.C. 1701 note.

b. Long before the issuance of PWR 107, Congress had become aware that large ranching operations were using various methods to control vast areas of public lands by gaining control of areas containing the limited water sources. See *Improvement and Regulation of Grazing on the Public Lands of the United States: Hearings on H.R. 19857 Before the House Comm. on Public Lands*, 62d Cong., 2d Sess. 80 (1912). In 1916, Congress directly addressed that problem through Section 10 of the Stock Raising Homestead Act (SRHA), ch. 9, 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). Section 10 prevented stock watering holes from being patented to homesteaders and expressly authorized the President to reserve "lands containing water holes or other bodies of water needed or used by the public for watering purposes." It delegated regulation of this program to the Secretary of the Interior. *Ibid.*[5]

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[5] Section 10 stated:

> That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act [for entry] but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten [the Pickett Act], and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder.

39 Stat. 865, 43 U.S.C. 300 (repealed 1976). See also H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916). ("[Section 10] authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and

Following the enactment of Section 10, the Secretary of the Interior prepared PWR 107 as a proposed executive order for the President. The Secretary stated that PWR 107 was necessary to prevent private persons from obtaining exclusive use of springs and water holes on the public domain, noting additionally that the withdrawal was "advisable" due to the "pendency of grazing legislation" that later was enacted as the Taylor Grazing Act.[6] On April 17, 1926, President Coolidge issued PWR 107, an executive order that specifically "reserved for public use"

> [e]very smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land.

43 C.F.R. 292.1 (1938) (Pet. App. 26-27); Clerk's R. 95.

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other bodies of water that are necessary for large surrounding tracts of country; so that a person cannot monopolize or control large territory by locating as a homestead the only available water supply for stock in that vicinity.").

[6] Secretary Work wrote to President Coolidge:

> The control of water in the semiarid regions of the west means control of the surrounding grazing areas, possibly in some regions of millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain [*i.e.*, the Taylor Grazing Act, eventually enacted in 1934, 43 U.S.C. 315 *et seq.*], it is believed important to retain the title to and supervision of such springs and water holes on the unreserved public lands as have not already been appropriated.

Letter from Secretary of the Interior Work to President Coolidge (Apr. 17, 1926) (submitting PWR 107 as a proposed order)(Clerk's R. Exh. 25).

From the drafting of PWR 107 to the present, the Department of the Interior—the agency responsible for management of the public rangelands and implementation of PWR 107—has consistently interpreted PWR 107 as having effected a reservation of springs and water holes on the public lands. The original regulations issued with respect to PWR 107, which were contained in Instructions issued in May 1926 by the Commissioner of the General Land Office, construed PWR 107 as having withdrawn springs and water holes for "watering purposes":

> It [PWR 107] *withdraws those springs and water holes* capable of providing enough water for general use *for watering purposes.*

Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended, Circular No. 1066, 51 Interior Dec. 457 (1926) (emphasis added) (Clerk's R. Exh. 26). The applicable regulations subsequently issued by the Secretary likewise identified the same scope and purposes for PWR 107:

> The Executive order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. * * * *It withdraws those springs and water holes* capable of providing enough water for general use *for watering purposes.*

43 C.F.R. 292.2 (1938) (emphasis added).[7]

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[7] The Solicitor of the Interior's opinions have similarly construed the scope of PWR 107. See *Compliance by the Department with State Laws Concerning Water Rights, Sol. Op. M-33969* 6 (Interior Dec. Nov. 7, 1950) (PWR 107 "withdr[ew] such water

2. Petitioner State of Idaho has enacted legislation requiring a general adjudication of water rights in the Snake River Basin within the State's borders. Idaho Code § 42-1406A(1) (1990 & Supp. 1998). Idaho has joined the United States as a party in the Snake River Basin Adjudication (SRBA) pursuant to the McCarran Amendment, 43 U.S.C. 666. See *United States* v. *Idaho*, *supra*; *In re Snake River Basin Water Sys.*, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989). In response, the United States has filed water rights claims under federal and state law.

a. The United States has filed, on behalf of the Department of the Interior's Bureau of Land Management (BLM), approximately 11,000 federal reserved water right claims based on PWR 107 for stockwater purposes. The BLM asserts those water rights primarily for the benefit of its Taylor Grazing Act permittees, who graze livestock on public lands. The BLM's maintenance of those rights ensures that water will be perpetually available for stockwater purposes by whichever member of the public happens at any time to

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generally from private appropriation") (Clerk's R. Exh. 30); *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, Sol. Op. M-36914*, 86 Interior Dec. 553, 580 (1979) ("This blanket withdrawal had the effect of reserving not only the *land*, but also the *water* for public use.") (Clerk's R. Exh. 31); 86 Interior Dec. at 581 ("The 1926 reservation was *designed to prevent this private monopolization of water on the public domain.* The means used was the traditional and most effective way of preserving resources on the public domain, *i.e.*, restricting entry by withdrawing the land and thus *maintaining the water thereon open and free for public use.*") (emphasis added); *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, Sol. Op. M-36914 (Supp. II)*, 90 Interior Dec. 81, 83 (1983) (Clerk's R. Exh. 32).

have the grazing permit for the lands containing the relevant springs or water holes. In the absence of the government's reservation or appropriation of the water, the water would be available for private appropriation, to the exclusion of the public and to the potential detriment of the federal grazing permittees.

b. In conducting the SRBA, the district court periodically has designated "Basin-Wide Issues," in order to address significant legal questions before issuing a final decree. At the request of a few SRBA water right claimants, the district court designated Basin-Wide Issue No. 9:

> Whether Public Water Reserve 107 is a valid basis for a federal reserved water right.

Clerk's R. 77. Following briefing and a hearing, the district court ruled that PWR 107 does not provide a valid basis for a federal reserved water right. Pet. App. 13-27. The court stated that PWR 107 "withdraws from entry public lands which surround water sources in order to keep homesteaders from controlling large land tracts by settling around the only water supply available for public use," *id.* at 13-14, but it concluded that PWR 107 does not constitute either an express or implied reservation of water, *id.* at 25.

c. By unanimous decision, the Idaho Supreme Court reversed. Pet. App. 1-12. The Idaho Supreme Court explained that this Court's decisions in various cases, including *Cappaert* v. *United States*, 426 U.S. 128 (1976), and *Winters* v. *United States*, 207 U.S. 564 (1908), recognize that Congress may reserve water for federal purposes expressly or by implication. Pet. App. 4-5. Under those decisions, the courts will find that a reservation of land includes an implied reservation of water if the water is needed to accomplish the purpose

of the reservation. *Ibid.* The Idaho Supreme Court explained:

> [W]here a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

Id. at 5. The court then applied that test, "turn[ing] to an examination of PWR 107, together with its enabling legislation and the circumstances and history surrounding its creation, to determine whether a federal reserved water right exists in the present case." *Id.* at 6.

The Idaho Supreme Court found that PWR 107 evidences an "express intention by Congress" to reserve water in the statutes authorizing its issuance. Pet. App. 9. Based on its review of the text and legislative histories of those statutes and documents and circumstances surrounding the issuance of PWR 107, the court "agree[ed] with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right." *Ibid.* (citing *United States* v. *City & County of Denver*, 656 P.2d 1, 31 (Colo. 1982)). The Idaho Supreme Court concluded that "the purpose of PWR 107 would be entirely defeated" without a reserved water right, *id.* at 10, and it accordingly held that "PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering," *id.* at 11.

ARGUMENT

The Idaho Supreme Court correctly applied settled law to conclude that Public Water Reserve No. 107 created a federal reserved water right for stock-watering. The Colorado Supreme Court has reached the same conclusion, and no other state supreme court or federal court of appeals has addressed the question. The Idaho Supreme Court's decision is not only correct, but the matter has limited practical importance. There is accordingly no warrant for this Court's review.

1. This Court does not ordinarily review questions of statutory or regulatory construction in the absence of a disagreement among the federal courts of appeals or state courts of last resort. See Sup. Ct. R. 10. As petitioners concede, no such conflict exists here. See Idaho Pet. 23 n.7. No federal court of appeals has addressed the question, and the only two state supreme courts that have addressed the issue are in agreement. See Pet. App. 9; *United States* v. *City & County of Denver*, 656 P.2d 1, 31 (Colo. 1982).[8]

2. Petitioners nevertheless assert that the Idaho Supreme Court's decision "is in [d]irect [c]onflict with the [l[aw [g]overning [f]ederal reserved [w]ater [r]ights as [e]stablished by this Court in *United States* v. *New Mexico*, 438 U.S. 696 (1978)." Idaho Pet. 7; see Hoagland Pet. 7. As petitioners note, this Court's decision in

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[8] The Nevada State Engineer has also recognized reserved water rights claims made by the United States under PWR 107. See Nevada State Engineer's Notice and Order Fixing and Setting Time and Place for Inspection, *In re the Determination of the Relative Rights in and to the Water of Southern Monitor Valley in Nye County, Nevada* (Feb. 15, 1996). Similarly, a New Mexico district court has decreed federal reserved water rights under PWR 107 in the Red River adjudication. See *New Mexico* v. *Molybdenum Corp. of Am.*, CIV 9780-SC (D.N.M. June 11, 1992).

New Mexico recognized that Congress generally defers to the States in matters concerning the use of water. Idaho Pet. 16. The *New Mexico* decision also recognized, however, that "the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas." *New Mexico*, 438 U.S. at 715. "[W]hatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, * * * Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *Id.* at 698.[9]

As the Idaho Supreme Court correctly explained (Pet. App. 4-5), when the United States reserves federal land from the public domain, it also reserves unappropriated water to the extent necessary to accomplish the purpose of the reservation. See *Winters* v. *United States*, 207 U.S. 564 (1908) (the federal government, by setting aside an Indian reservation, also impliedly confirmed to the Indians a reservation of a portion of the waters of the adjoining stream in order to satisfy the Indians' needs); *Arizona* v. *California*, 373 U.S. 546, 601 (1963) (rule underlying reservation of water rights for Indian reservations is equally applicable to other federal establishments). The

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[9] See also *California* v. *United States*, 438 U.S. 645, 662 (1978) (States have authority over internal waters "except where the reserved rights or navigation servitude of the United States are invoked"); *Cappaert* v. *United States*, 426 U.S.128, 145 (1976) (federal reserved water rights derive from federal reservations, and "are not dependent upon state law or state procedures").

Court stated the controlling principles in *Cappaert* v. *United States*, 426 U.S. 128 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138. See also *New Mexico*, 438 U.S. at 698-700; *City & County of Denver*, 656 P.2d at 17-18. The Idaho Supreme Court correctly applied those principles to this case. See Pet. App. 6-9. The court concluded, based on "the plain and ordinary words of the enabling statutes and executive order," that "PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *Id.* at 9.

The Idaho Supreme Court specifically noted that Congress, through Section 10 of the Stock Raising Homestead Act (SRHA), "authorized the President to reserve lands containing waterholes or other bodies of water needed or used by the public for watering purposes." Pet. App. 7. Section 10, which expressly provides for reservation of land "containing water holes," 39 Stat. 865, 43 U.S.C. 300 (repealed 1976), clearly contemplates the reservation of both land and the water holes the land contains. See Pet. App. 7-8 (quoting H.R. Rep. No. 35, 64th Cong., 1st Sess. 1916)). Congress did so to ensure that individual settlers could not "monopolize or control a large territory by locating as a homestead the only available water supply for stock in that

vicinity." Pet. App. 8 (quoting H.R. Rep. No. 35, *supra*); see Pet. App. 9-10. Furthermore, the Secretary of the Interior's recommendation supporting the creation of PWR 107, "which was written in contemplation of the then pending Taylor Grazing Act of 1934, stated that the purpose of PWR 107 was to 'retain the title to and supervision of such springs and water holes.'" *Id.* at 10. "Without the reserved water right for such springs and waterholes, the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes." *Ibid.*

Contrary to petitioners' assertions, the Idaho Supreme Court's decision is consistent with this Court's decisions discussing the federal reserved water rights doctrine. In particular, there is no merit to petitioners' assertion that PWR 107 was intended "to [m]ake [w]ater on the [r]eserved [l]and [a]vailable for [p]rivate [a]ppropriation." Idaho Pet. 8. Section 10 of SRHA explicitly states Congress's intent that the "lands containing water holes or other bodies of water needed or used by the public" shall be "kept and held open to the public use for such purposes." 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). That object would be thwarted if individuals could appropriate that water and exclude other members of the public. Rather, Section 10 contemplated that the federal government would reserve those water resources for the benefit of whichever members of the public who are entitled, at any given time, to use the lands containing the reserved springs and water holes.

Petitioners are also mistaken in suggesting that the Idaho Supreme Court's construction of PWR 107 should be rejected because, before the creation of PWR 107, the Interior Department had not described public

water reserves as creating a federal reserved water right. See Idaho Pet. 9-13; Hoagland Pet. 9. The important point, for purposes of interpreting PWR 107, is what the Interior Department has stated about PWR 107. In creating PWR 107, the Interior Department expressly stated that PWR 107 "withdraws those springs and water holes capable of providing enough water for general use for watering purposes." *Selections, Filings, or Entries of Lands Containing Springs or Water Holes—All Prior Instructions Amended, Circular No. 1066*, 51 Interior Dec. 457 (1926) (Clerk's R. Exh. 26). It has consistently adhered to that understanding. See 43 C.F.R. 292.2 (1938); see also note 7, *supra* (collecting Solicitor opinions).

Furthermore, petitioners are wrong in suggesting that there is an insufficient basis under *New Mexico* for finding a federal reserved water right. Idaho Pet. 15-20. Unlike many withdrawals, in which the connection between the purpose of the reservation and the necessity of water to accomplish that purpose is inferred (*e.g.*, where the purpose of a withdrawal is agricultural use), PWR 107 presents a circumstance in which the reservation's text and objectives demonstrate that water itself was at the heart of the withdrawal. Thus, the Idaho Supreme Court correctly found that an "express intention" to reserve water was clear from the enabling legislation. Pet. App. 9.

The connection between the withdrawal, its purpose, and the necessity of water to accomplish that purpose is particularly self-evident in the case of PWR 107. As described above, PWR 107 was issued for the specific purpose of protecting the public's right to use particular water resources. In urging the President to issue PWR 107, the Secretary of the Interior emphasized that "it is believed important to *retain the title to and*

supervision of such spring and water holes on the unreserved public domain." Pet. App. 8 (quoting Letter from Secretary of the Interior Work to President Coolidge (Apr. 17, 1926) (submitting PWR 107 as a proposed order) (Clerk's R. Exh. 25) (emphasis added)). Contrary to petitioners' suggestion (Idaho Pet. 15), the Secretary expressly linked PWR 107 to the need for stock use of the water. See *ibid.* (stating that the water was needed for "*grazing*" lands) (emphasis added).[10]

Petitioners are incorrect in asserting that "the language and history of the statutes upon which PWR 107 is based rebut any assertion that Congress intended to authorize or that the President did in fact reserve a water right under PWR 107 for stockwatering purposes." Idaho Pet. 15. By its terms, Section 10 of the

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[10] Petitioners are also mistaken in asserting that the Idaho Supreme Court improperly linked the United States' PWR 107 claims in the SRBA to use by Taylor Grazing Act permittees, because supposedly "the Taylor Grazing Act of June 28, 1934 * * * was only an optimistic gleam in a federal bureaucrat's eye in 1926" (Idaho Pet. 8 n.2) when PWR 107 was issued. The Secretary's letter to the President expressly recognized the need for the reservation of the springs and water holes "in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain." Pet. App. 8 & n.2 (quoting Letter from Secretary of the Interior Work, *supra*). The congressional debate over the precise form of the federal leasing program continued for several years until the 1934 enactment of the Taylor Grazing Act, but the issuance of PWR 107 was plainly linked to that legislation. The Department made clear immediately following the issuance of PWR 107 that "the order would be of material aid in event of the passage of grazing legislation of the type proposed in S. 2584," a predecessor bill to the Taylor Grazing Act. U.S. Reply Br. (Idaho Sup. Ct.) 10 (quoting Letter from First Ass't Secretary Edward Finney to Senator John Kendrick (May 5, 1926) (on file with Department of Interior, Central Classified Files 1907-1936, File 2-188, National Archives, College Park, Md.).

SRHA clearly authorizes reservations of land and water, expressly providing for reservations of land "containing water holes" and further providing for public access "to watering places reserved hereunder." 39 Stat. 865, 43 U.S.C. 300 (repealed 1976). See also Pet. App. 7-8 (quoting H.R. Rep. No. 35, *supra*) ("[Section 10] authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country; so that a person cannot monopolize or control large territory by locating as a homestead the only available water supply for stock in that vicinity.").[11]

The Hoagland petitioners additionally assert that "events" subsequent to 1926 have "terminated any need for even the reservation of land resulting from PWR 107's withdrawal of land" (Hoagland Pet. 11-12). The Hoagland petitioners identify the enactment of the Taylor Grazing Act as one such "event." *Ibid.* That argument, however, is unpersuasive. As the Idaho Supreme Court recognized, the rationale for PWR 107 rested, in part, on the government's need to retain title to springs and water holes in anticipation of the proposed grazing legislation that became the Taylor Grazing Act. Pet. App. 8 n.2. Similarly, the Hoagland petitioners' assertion that the enactment of FLPMA

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[11] There is no merit to petitioners' suggestion (Idaho Pet. 18) that the Idaho Supreme Court's decision is inconsistent with this Court's rejection of certain stockwater claims at issue in *New Mexico*. The *New Mexico* decision addressed the validity of the Forest Service's 1897 Organic Administration Act, 16 U.S.C. 473 *et seq.* (Organic Act), as a basis for federal reserved water right claims. See 438 U.S. at 706-711. That decision did not address or concern PWR 107.

"conclusively destroyed any contention that a need for reservation of water existed" (Hoagland Pet. 12) ignores that Act's unambiguous language to the contrary. FLPMA specifically addressed the issue of existing withdrawals and reservations, providing in Section 701(c) that all "withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." Pub. L. No. 94-579, 90 Stat. 2786, 43 U.S.C. 1701 note. That provision makes clear that Congress maintained intact all pre-FLPMA reservations and withdrawals, including PWR 107. See Pet. App. 11.

In sum, the Idaho Supreme Court correctly described the reserved water rights doctrine and properly applied it to the circumstances of this case by analyzing the words, meaning, and objectives of the enabling legislation and the implementing executive order. The Idaho Supreme Court's conclusion that PWR 107 created a federal reserved water right rests on a correct application of settled principles that does not warrant further review.

3. This Court's review is also unwarranted because PWR 107's creation of modest reserved rights for stock watering does not, as a practical matter, have any significant effect on water allocation within the State of Idaho. Idaho has itself recognized the right of the United States to obtain water rights on public land so that the federal government can properly manage and implement its rangeland grazing program. See, *e.g.*, Idaho Code § 42-501 (1990). The practical effect of the Idaho Supreme Court's ruling—which preserves stock-watering rights on public land—is accordingly consistent with the State's water use policies. In addition, the federal reserved water rights created by PWR 107

will be administered under the State's prior appropriation doctrine and, therefore, will not invalidate any preexisting private rights. In sum, the Idaho Supreme Court's decision will not result in any fundamental change in the use and allocation of water within the State.[12]

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[12] There is no basis in the record for petitioner State of Idaho's assertion that its own Supreme Court's decision "will displace thousands of water rights established by private individuals under Idaho law." Idaho Pet. 7; see also Idaho Pet. 21. Only a handful of individuals objected to the government's PWR 107 claims, and only a small percentage of individuals have asserted claims to state-law water rights to the same source. Moreover, all persons who could use the springs and water holes on the public rangelands, through exercise of their Taylor Grazing Act permits, benefit from the government's assertion of these water right claims, as do all potential future permittees. We note, too, that the Idaho district court has determined that very little water is at stake in these stockwater right claims, having found (1) that "[d]omestic and stock water uses collectively divert annually less than one per cent of the 36 million acre feet [of water] which leaves the state each year"; and (2) that "[t]he Idaho Department of Water Resources has not found it necessary in recent adjudications to distribute water to domestic or stock water uses because of the small amounts diverted, except for isolated headwater streams." *In re the General Adjudication of Rights to the Use of Water from the Snake River Drainage Basin Water System*, No. 39576 (Idaho Dist. Ct. Jan. 17, 1989) (Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-684

In The

Supreme Court of the United States

October Term, 1998

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

REPLY BRIEF FOR THE STATE OF IDAHO

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE STATE OF IDAHO 1

I. Federal Regulations Governing the Administration of Public Water Reserves Negate any Claim of a Federal Reserve Water Right 1

II. This Case Warrants Review 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

United States v. New Mexico, 438 U.S. 696 (1978) 5

STATUTES AND LEGISLATIVE MATERIALS:

H.R. 407, 64th Cong. 2nd Sess. (1916) 1

Idaho Code Section 42-501 (1996) 4

Stock Raising Homestead Act, ch. 9, 39 Stat. 862 1

ADMINISTRATIVE REGULATIONS AND OPINIONS:

Circular No. 1028, Use of Lands Withdrawn as Public Water Reserves, 51 I.D. 186 (1925) 2, 3

State of Utah, 45 I.D. 551 (1916) 1

43 C.F.R. 2311.3 (1970) 3, 4

43 C.F.R. 2311.3 (1976) 4

MISCELLANEOUS:

Letter from Secretary of the Interior Lane to Senator George Sutherland (April 12, 1913) (on file with Department of the Interior, Central Classified Files 1907-1936, File 2-153, National Archives, College Park, Md.) 2

REPLY BRIEF FOR THE STATE OF IDAHO

The United States argued that "the Idaho Supreme Court correctly found that an 'express intention' to reserve water was clear from the enabling legislation [for PWR 107]." Brief For The United States In Opposition (the "U.S. Opposition Brief"), at 15. The United States makes this argument even though applicable federal regulations promulgated prior to this date and continued through 1976 are inconsistent with this claim. Like the United States, the Idaho Supreme Court ignored these regulations. Rather, the United States incorrectly continues to argue that the United States has consistently interpreted the PWR 107 as a federal reservation of water. Nothing could be further from the truth. Simply put, the United States in its Opposition Brief ignored the primary undisputed facts that establish PWR 107 did not create a federal reservation of water.

I. Federal Regulations Governing the Administration of Public Water Reserves Negate any Claim of a Federal Reserve Water Right.

The Department of the Interior issued its decision in *State of Utah*, 45 I.D. 551 (1916) during final congressional action on H.R. 407, 64th Cong. 2nd Sess. (1916), the bill that would become the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 ("SRHA"). The Assistant Secretary of the Interior concluded: "**There is in the withdrawal of these lands [for a public water reserve] nothing which prevents any person filing such an appropriation [of water] under the laws of Utah at any time.**" *Id.* 45 I.D. at 554. The State of Idaho argued this history shows that at the

time of enactment of the SRHA, Congress understood public water reserves were not intended to preclude the appropriation of water under state law; rather they were only intended to prevent entry of the land withdrawn under the various land disposal laws then in effect. Indeed, the Secretary of the Interior explained in 1913 that public water reserves were not intended to interfere with the appropriation of water from the water holes and springs under state law. Secretary Lane stated:

> The reserves do nothing more than withdraw from all forms of disposition the lands containing and surrounding the watering places. There has been no attempt on the part of the Government to interfere with the appropriation or utilization of waters which originate upon or flow across such reserves. It is difficult, therefore, to see how the reserves can interfere with the State laws for the appropriation and utilization of water.

Letter from Secretary of the Interior Lane to Senator George Sutherland (April 12, 1913) (on file with Department of the Interior, Central Classified Files 1907-1936, File 2-153, National Archives, College Park, Md.).

The entry of PWR 107 did not change this relationship. In 1925 the Department of the Interior adopted regulations in *Circular No. 1028, Use of Lands Withdrawn As Public Water Reserves*, 51 I.D. 186 (1925), that described the procedures for a person to use water from a public water reserve. That regulation required a member of the public as a condition of using water from a public water reserve spring to obtain a state water right. It stated:

> 8. Each permit shall contain, besides those necessary in individual cases, the following conditions:
>
> > A. That the right to appropriate the waters of the State to the uses contemplated shall be obtained within one year from and after issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.

Id. 51 I.D. at 187 (emphasis added). This regulation is directly inconsistent with the United States' present legal position. The United States argues that PWR 107 creates a federal reserve water right that precludes the private appropriation of water. Yet, the regulation required a member of the public to obtain a state water right if that person intended to use water from the public water reserve. Significantly, this regulation that was adopted just prior to entry of PWR 107 was continued in effect through 1976. For example, section 2311.3 of Title 43, Code of Federal Regulations, contained the regulations governing the use of water from public water reserves in 1970. Subsection (f) of that section states, in part:

> (f) *Conditions of permit; failure to comply with the same.* (1) Each permit shall contain, . . . the following conditions:
>
> (i) That the right to appropriate the waters of the State to the uses contemplated shall be obtained within 1 year from and after the issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.

43 C.F.R. 2311.3(f) (1970); Exhibit 28. A comparison of the two regulations shows that the requirement in 1925 is virtually identical with the requirement in 1970. Thus, this requirement to obtain a state water right when a member of the public wanted to use water from a public water reserve remained in effect for the entire applicable period. *See also* 43 C.F.R. 2311.3 (1976).

This history refutes the United States' contention that Congress and the Executive intended to reserve water by the creation of public water reserves.

II. This Case Warrants Review.

The United States suggests that this case does not warrant review because the assertion of these claims are consistent with the State's water policies and because only a handful of individuals objected to the government's PWR 107 claims. Both of these assertions misrepresent the situation before the Court.

The United States argues:

> PWR 107's creation of modest reserved rights for stock watering does not, as a practical matter, have any significant effect on water allocation with the State of Idaho. Idaho has itself recognized the right of the United States to obtain water rights on public land so that the federal government can properly manage and implement its rangeland grazing program. See, *e.g.*, Idaho Code § 42-501 (1990) [sic].

U.S. Opposition Brief at 18. The State of Idaho has encouraged the United States to utilize its state system of property law regarding water rights. For example, Idaho

Code § 42-501 (1996) reduces the application fee for the United States and streamlines the process for processing such applications. This case is not about that process, and the United States' PWR 107 claims are not consistent with state policy. Rather, the United States under the guise of a claim for PWR 107 proposes to create its own water right allocation system outside the state system.[1] This Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically rejected such a system for lands reserved by the U.S. Forest Service. *Id.* 438 U.S. at 717, n. 24. If the United States' contention in this matter prevails, a most anomalous result will occur. The State of Idaho will allocate water rights on lands expressly reserved by the U.S. Forest Service for governmental purposes; but the Bureau of Land Management will allocate water rights on the vacant public domain lands.

The United States' argument that "[o]nly a handful of individuals objected to the government's PWR 107 claims" and that, therefore, this is not a substantial dispute misrepresents the situation. U.S. Opposition Brief at 19, n. 12. First, this case arose out of proceedings that began in three sub-basins of over twenty within the Snake River Basin in Idaho. Procedurally, most of the stockwatering claims under PWR 107 have not been

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[1] The United States argues: "In addition, the federal reserved water rights created by PWR 107 will be administered under the State's prior appropriation doctrine. . . . " U.S. Opposition Brief at 18-19. The term "administration" as it relates to water rights may have different meanings. We understand the United States' argument and the Idaho Supreme Court's opinion to continue to recognize the distribution of water under state water law.

before the Idaho District Court for objection. Thus, the number of objections to PWR 107 claims is not a relevant criteria for determining the importance of these claims. Furthermore, contrary to the United States' argument, the number of water right claimants potentially affected is large because the United States asserts a priority date of April 17, 1926, for these claims. Many water rights have been developed in the State of Idaho since that date.

Second, a comparison of the amount of water diverted by stockwatering rights with the amount of water leaving the state at Lewiston, Idaho is an irrelevant comparison. U.S. Opposition Brief at 19, n. 12. Typically, the sources of water within public water reserves are the primary source of water within the immediate vicinity. The fact that the Snake River or one of its major tributaries is many miles downstream does not alleviate the water supply scarcity existing at the location of the public water reserve.

While the quantity of water may be small, the potential impact of the United States' argument is enormous. The practical effect of the United States' argument is to vest control over the patchwork of in-holdings of private and state lands adjacent to the public water reserves because it will control the allocation of scarce water supplies for adjacent state and private lands. Through a system designed to make water available for these lands, the United States attempts to construe the Idaho Supreme Court's decision as surrendering to it the exclusive right to allocate the scarce water supplies for these lands.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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